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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte BRIAN L. GILMAN and WILLIAM G. PAGAN

Appeal 2015-008236
Application 13/329,295
Technology Center 2100

Before MARC S. HOFF, JENNIFER L. McKEOWN, and LINZY T. McCARTNEY, *Administrative Patent Judges*.

McKEOWN, *Administrative Patent Judge*.

DECISION ON REQUEST FOR REHEARING

Pursuant to 37 C.F.R. § 41.52, Appellants request rehearing of our Decision dated November 2, 2016 ("Decision"), where we affirmed the Examiner's decision to reject claims 1–12. Request for Rehearing, dated June 6, 2014 ("Request"). We have reconsidered the Decision in light of Appellants' comments in the Request and, for the reasons noted below, we deny the request to modify our Decision.

Appellants contend that the Board failed to consider Appellants' argument that the Examiner mischaracterizes paragraph 184 of Mahaffey

and that Mahaffey teaches away from the claimed invention. Request 4–6. Appellants also allege the Board erred by finding Appellants waived the argument that Mahaffey teaches away from the claimed invention. *Id.* We find these arguments unpersuasive.

First, we disagree that the Examiner mischaracterizes Mahaffey. As Appellants point out, paragraph 184 describes that "[a]s can be seen, the cited portion of Mahaffey teaches issuing an alert to an end user [i.e. taking an action] if an application is associated with different ratings that compare beyond a threshold to a policy [in response to a set of ratings meeting a pre-stored threshold]." Request 4; *see also* Final Act. 4–5 (noting that Mahaffey describes that "[f]or example, when a user installs an application, the software 'retrieves an assessment for the application and compares the application's privacy, security and battery ratings with the policy thresholds and alerts the user if the application exceeds the configured policy.' (Mahaffey at par. [0184])."). Both the Examiner and the Board explain that the rejection then relies on Burke as teaching prompting the computer to apply the update. Final Act. 4, 8; Ans. 5; Decision 4; *see also* Mahaffey ¶ 184 (noting that "[i]nstead of blocking installation of an application that is undesirable, a user may want to simply be warned of the undesirability" and, as such, the installation may at times be installed). As noted in the Decision, Appellants' argument fails to consider the combination of Mahaffey with Burke. Decision. 4–5; *see also* Final Act. 4–5; Ans. 6.

Second, we disagree that the Board incorrectly finds Appellants' teaches away argument, which was presented for the first time in the Reply Brief, was waived. Although Appellants allege that the argument was presented in response to newly presented arguments by the Examiner,

Appellants fail to identify any such arguments. *See* Request 5–6. To the contrary, the Examiner relies on precisely the same findings and arguments as presented in the Final Action. *Compare* Final Act. 3–6, 7–9, *with* Ans. 5–7. We also note that Appellants' arguments in the Reply Brief do not merely identify an alleged mischaracterization in the Examiner's Answer but adds the new argument that Mahaffey teaches away from the claimed invention. *See* Reply Br. 8–9. Moreover, despite Appellants' untimely presentation of the argument, the Decision, nevertheless, considers and rejects the newly presented argument. *See* Decision 6–7.

We have considered the arguments raised by Appellants in the Request, but the arguments are not persuasive to find that the original Decision was in error. Based on the record before us now and in the original appeal, we are still of the view that the Examiner did not err in rejecting claims 1–12.

REHEARING DENIED